

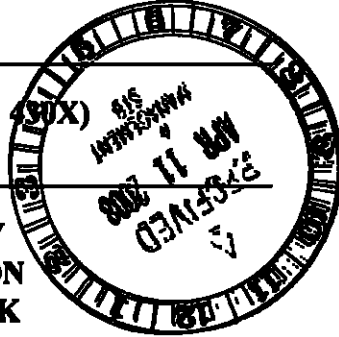
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-6 (Sub- No. 480X)

**BNSF RAILWAY COMPANY
ABANDONMENT EXEMPTION
IN OKLAHOMA COUNTY, OK**



MOTION FOR CLARIFICATION

1 Edwin Kessler ("Kessler"), herewith files this Motion for Clarification, requesting that the Board clarify what it's February 7, 2008 Order was intended to stay.

BACKGROUND INFORMATION

2. On February 7, 2008, Chairman Nottingham ordered BNSF not to consummate the abandonment of the Line of railroad which is the subject of the above entitled proceeding.

3. On February 14, 2008, Tom Elmore, a party to this proceeding, observed, photographed, and spoke with an individual who identified himself as "Wesley," who was the foreperson of a crew that was salvaging the Line, and who stated his salvaging activities were pursuant to a salvage contract with BNSF. Mr. Elmore also had a conversation with Corey Burkhart, the BNSF Oklahoma City Roadmaster, who stated to Mr Elmore that the Line was being salvaged pursuant to a BNSF salvage contract

4. On February 15, 2008, Kessler filed his initial Comments of Edwin Kessler, wherein he stated the J B F. Tie and Rail Company had been engaged to begin dismantling the line

5. On **February 26, 2008**, Tom Elmore observed and photographed a newly constructed cantilevered railway crossing signal at the S. Agnew Avenue crossing of the Chickasha / former Frisco Line, near MP 542.8, which is about 600 feet from the end of the portion of the Line that BNSF proposes to abandon (at MP 542.91). Mr. Don R. Moad of Ram Products, Inc., which is located about 200 feet north of the Frisco Line / S. Agnew crossing, told Mr. Elmore that he witnessed the erection of the signal pole in the middle of the tracks on February 22, 2008, or just 8 days after Mr. Elmore observed a salvage crew salvaging the Line near MP 540.4.

6. On **February 26, 2008**, Mr. Elmore photographed the Frisco / Chickasha Line at MP 540.2. [The signal box in the photograph is clearly labeled "Santa Fe MP 540.20."] This photograph, which was previously provided to the Board, clearly shows that on February 26, 2008, the turnout to the Shields Spur [on the right of the photograph] was still in place, as was about 100 feet of the Frisco / Chickasha Line.

7. On **March 17, 2008**, when Mr. Elmore revisited the Frisco / Chickasha Line at MP 540.20, he observed, and photographed, that portion of the Frisco Line that he had photographed on February 26, 2008. Mr. Elmore's March 17, 2008 photograph clearly shows the turnout to the Shields Spur, and an additional 100 feet of the Frisco / Chickasha Line **had been removed** sometime between February 26, 2008 and March 17, 2008, contrary to Chairman Nottingham's February 7, 2008 Order directing BNSF to stop salvaging the Frisco / Chickasha Line.

8. On **April 3, 2008**, the Wittwer Construction Company, pursuant to a contract with the Oklahoma Department of Transportation, began excavating several thousand yards of soil from the Line in the vicinity of Lee Ave, which is near the middle of the Line at MP 541.

9. On **April 7, 2008**, Hulcher Services, pursuant to a contract with BNSF, removed an additional 200 feet of the Line near Lee Ave, to permit the Wittwer Company to excavate under the Line. According to Wittwer Construction personnel, the reason for this excavation work, is to build a culvert under the Line.

10 On February 19, 2008, BNSF filed its Reply to February 15, 2008 Edwin Kessler Comments BNSF attached to its Reply, a Verified Statement of Susan L. Odom, Manager – Network Strategy. In her Verified Statement, Ms. Odom stated “to her **current actual** knowledge, information, and belief:”

- A. A portion of the Line “was cut by BNSF forces on January 25, 2008.”
- B. No additional salvage work has since been performed by BNSF or any BNSF authorized contractor.
- C. BNSF has not issued a signed contract for the salvage work.
- D. “Any salvage activity performed on the subject line on February 14, 2008 was done so without the permission of and without direction from this office, which is responsible for doing so. Further, this office has no knowledge of or information on a company by the name of J.B.F. Tie and Rail Co. Mr Kessler’s speculative statement that BNSF has engaged J.B.F. Tie and Rail Co. to begin dismantling the line is false ”

11. On April 8, 2008, BNSF filed its Reply to Kessler’s March 24, 2008 Motion for Cease and Desist Order. In its April 8, 2008 Reply, BNSF argued pursuant to this Board’s February 22, 2008 decision in *The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS, In the matter of a Request to Set Terms and Conditions, (“Vicksburg”)* at p. 9, that BNSF has the right to remove its track material without Board authority, so long as no shipper seeks service and so long as the carrier is prepared to restore the track should it receive a request for service **from a shipper**. BNSF further argued that Chairman Nottingham’s February 7, 2008 Order staying abandonment of the Line, only stayed BNSF from **fully** abandoning the Line, and anything less than a full abandonment of the Line, did not violate Chairman Nottingham’s February 7, 2008 Order. In effect, BNSF has argued that it has the right to remove all of the rail, except for the last few sticks, and it has the right to diminish the property interests associated with the Line, so long as it leaves a few sticks of rail on the ground, and so long as it agrees to restore the rail it removes if a **shipper** requests service, and then only if the Board denies BNSF authority to abandon the Line.

12 Since the Board has failed to take any action to prevent BNSF or its cohorts from salvaging the Line, on **April 7, 2008**, Kessler filed a Complaint for Injunctive Relief in the

United States District Court for the District of Oklahoma, pursuant to 49 U.S.C. §11704, asking that Court to enjoin BNSF and the Oklahoma Department of Transportation from violating Chairman Nottingham's February 7, 2008 Order, and specifically asking that court to order BNSF and ODOT to cease all salvaging activities on the Line. The judge ordered the parties to submit briefs relating to Kessler's request for a Preliminary Injunction, by April 18, 2008

PRIOR BOARD / COMMISSION PRECEDENT

13 In *The Baltimore and Ohio Railroad Company, Metropolitan Southern Railroad Company and Washington and Western Maryland Railway Company Abandonment and Discontinuance of Service – In Montgomery County, MD, and the District of Columbia*, Docket No. AB-19 (Sub-No. 112) ICC served March 16, 1987, The Baltimore and Ohio Railroad removed a portion of its track, ties and ballast. When the Georgetown Branch Preservation Group protested the removal of the track material, the ICC found that it would be inequitable to require the carrier to put the line back into operating condition if the cost of track restoration would be substantial and the ICC would be expected to shortly determine whether an abandonment was authorized.

14. In *Busboom Grain Co. v. Interstate Commerce Commission*, 830 F.2d 74 (7th Cir 1987), the court held a carrier **might** be required to restore track material it removed prior to judicial review of a decision granting abandonment authority. This decision made it clear, that the Board **was not required** to order the carrier to restore any track material removed before completion of the abandonment proceeding.

15. In the *Vicksburg* case cited by BNSF, the Board held the Kansas City Southern Railway Company would not be required to restore track material removed some years ago, even though the track material was removed without authority.

16 In *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523 (6th Cir 2002) ("*Railroad Ventures*") at 552, the 6th Circuit held:

“Thus, while a railroad may ‘abandon any part of its railroad lines’ under 49 U.S.C. §10903 (a)(1)(A), the STB is permitted to authorize a prospective buyer under the OFA provisions to purchase ‘that part of the railroad line to be abandoned’ under 49 U.S.C. §10904(d). The line owner can seek authority to abandon all or a part of its rail line, but if it does so, then, pursuant to §10904(f)(1)(B), a qualified OFA purchaser is entitled to determine how much of the line it wishes to acquire. *Id.* 13. Once the offeror seeks to purchase the entire rail line or a portion thereof as described in the abandonment petition, 49 U.S.C. §10904(c), the STB is then statutorily obligated to render a decision setting price and other sale terms as to what the offeror seeks to buy, within thirty days of a request to set conditions. 49 U.S.C. §10904 (f)(1)(A). Under this statutory provision, then, it necessarily follows that neither the abandoning rail carrier nor the STB can alter or amend what the OFA buyer has offered to buy, rather, the STB can only set the terms on what the offeror has proposed to purchase.

In short, once the owner of a rail line submits a petition seeking the STB’s authority to abandon the line, it must allow a prospective OFA purchaser the opportunity to determine how much of the line to acquire, **as the line is described in the abandonment petition**. **Thus, at the point of filing the abandonment petition the abandoning rail line owner cannot reduce or diminish the rail line or the nature of the property interests associated with the line. Because a rail line owner is subject to the STB’s jurisdiction until such time that the line has been properly abandoned or sold, it therefore must maintain the status quo with respect to its property interests in the rail line as described in its abandonment petition.”** (Emphasis added.)

REQUEST FOR CLARIFICATION

17. BNSF has argued it has a continuing right to remove track material from the Line, and to diminish the property interests associated with the Line. BNSF has further argued Chairman Nottingham’s February 7, 2008 Order did not abrogate BNSF’s right to remove additional track material nor did it abrogate BNSF’s right to diminish the property interests associated with the Line. And finally, BNSF has argued it would be obligated to restore any track material it removed **only if a shipper on the Line requested service over that portion of the Line that was removed, and then only if the Board denied BNSF’s request for authority to abandon the Line.**

18. Kessler would argue *Railroad Ventures* commands a rail carrier “**cannot reduce or diminish the rail line or the nature of the property interests associated with the line.**

Because a rail line owner is subject to the STB's jurisdiction until such time that the line has been properly abandoned or sold, it therefore must maintain the status quo with respect to its property interests in the rail line as described in its abandonment petition."

19 At the April 7, 2008 preliminary hearing on Kessler's Complaint for Injunctive Relief, in the U.S. District Court in Oklahoma City, the attorney for BNSF argued BNSF should be allowed to remove the track material, since the purchase price for the Line would be reduced by the net liquidation value of the track material that was removed. The problem with this argument, is the cost to restore the removed track material is many times greater than the net liquidation value of the track material. For example, in the *Vicksburg* case, the Board held the net liquidation value of 1.9 miles of 115# welded track material was \$272,820, or about **\$27.19 per foot**. The Line in this proceeding is also 115# welded rail, and so would have a comparable value. According to the BNSF lawyer, BNSF would reduce the price of the Line by about \$27 a foot, for each foot of track material it removed. Unfortunately, it costs about **\$200 a foot to restore track material**. So agreeing to reduce the price of the line by the net liquidation value of whatever track material is removed, would not make Kessler whole, for the **cost to restore track material is about 8 times more than the net liquidation value of the track material**. As was highlighted in the *Vicksburg* case, the cost to restore a bridge that was removed during the abandonment proceeding was almost half the value of the entire line!

20 The Union Pacific Railroad ("UP") has a line of railroad that is about 50 feet from, and parallel to, the BNSF track that is the subject of this proceeding. At the April 7, 2008 preliminary hearing, the attorneys for both BNSF and ODOT indicated BNSF, ODOT, and UP, planned to reroute UP trains onto the BNSF line, during the period of time the UP track was scheduled to be out of service (for a number of months), due to ODOT's highway project

21. Kessler would argue this planned use of the BNSF Line by UP, contravenes BNSF's NOE representation to the Board, that the Line, as of September 23, 2005, was no longer needed for freight rail service. While BNSF's representation to the Board (that the Line was no longer needed by BNSF for freight rail service), was, if strictly construed, almost truthful, [The only portion of the Line that BNSF needed to use, was that portion between MP 539.96 and MP

540.4, which BNSF **still needs to use** to access the Producers Co-Op spur.], Kessler would argue this representation was highly misleading.

22. According to BNSF's April 8, 2008 filing, the Packingtown Lead was first made available to the Stillwater Railroad Company on January 25, 2008. Prior to this date, Stillwater **had to use the BNSF Line** to get from the East side of Oklahoma City to the West side of Oklahoma City. This explains why Tom Elmore photographed a Stillwater train operating on the Line in February, 2007, even though Stillwater did not have authority to operate on the entire Line.

23. In addition, the Line will be needed by UP during the period of time the UP's tracks are out-of-service. Since Stillwater **needed** the BNSF line until January 25, 2008, or for nearly 3 years after BNSF filed its NOE to abandon the Line, for overhead service, and since UP **will need** the line for overhead service for a number of months sometime in the future, while UP's tracks are out-of-service, Kessler would argue BNSF's representations in its NOE, that the Line was not needed for overhead service, and that overhead service could be rerouted, was in fact, **untruthful**

24. Kessler acknowledges there is precedent supporting BNSF's argument, and further acknowledges that Chairman Nottingham's Order did not specifically order BNSF to cease all salvaging of the Line, did not direct BNSF to maintain the status quo, nor did it direct BNSF not to diminish the property interests associated with the Line. Chairman Nottingham's Order also did not direct other parties, such as ODOT or Watco (Stillwater Central Railroad), not to salvage the Line or to diminish the property interests associated with the Line.

25. Kessler would argue the spirit and intent of Chairman Nottingham's Order, was to order BNSF, and all other persons, to cease salvaging the Line, and to cease diminishing the property interests associated with the Line, and to maintain the status quo, until the Board ruled on Kessler's Petition to Reopen. Kessler would further argue that *Railroad Ventures* commands a rail carrier, and all other parties, to maintain the status quo until an abandonment proceeding has been completed

26. WHEREFORE, Kessler would respectfully request the Board clarify its February 7, 2008 Order, by specifically ordering BNSF and all other parties, to cease all salvaging activities on the Line, to cease diminishing the property interests associated with the Line, and to maintain the status quo until the Board renders its decision regarding Kessler's Petition to Reopen

27. Kessler would further request that the Board clarify its February 7, 2008 Order by April 17, 2008, so that the U.S. District Court in Oklahoma has a better understanding of what it is the Board wants BNSF to stop doing

Respectfully submitted,



Edwin Kessler

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2008, a copy of the foregoing Motion for Clarification, was served by first class mail, postage prepaid, upon the parties of record noted below.



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